Chong Wooi Leong & Ors v Lebbey Sdn Bhd (No 2)

COURT OF APPEAL (CIVIL APPLICATION NO B-02-407 OF 1997
NH CHAN, ABU MANSOR AND AHMAD FAIRUZ JJCA
6 MARCH 1998

Civil Procedure *— Stay of execution of judgment — Application for — Whether Court of Appeal has jurisdiction to grant stay of its order pending hearing of appellants' leave to appeal application before the Federal Court — Whether appellants' application for leave would be rendered nugatory if stay is not granted — Whether stay should instead be dealt with by the Federal Court before which an application for leave to appeal is pending — Courts of Judicature Act 1964 s 79 & Schedule item 6 — Rules of the Court of Appeal 1994 r 76*

The appellants lost their appeal in the Court of Appeal (see [1998] 2 MLJ 644) and were ordered to give vacant possession of their premises to the respondent ('the order'). In the meantime, they applied for a stay of the order — ie for the preservation of the property — by this court pending the hearing of their leave to appeal application before the Federal Court. Leave of the Federal Court to appeal against the Court of Appeal decision had yet to be granted by the Federal Court. The issue was whether the Court of Appeal has jurisdiction to make such an order. Counsel for the appellant contended that if the order was not stayed, then the respondent would demolish the appellants' premises and this would consequently render their application for leave to appeal nugatory. On the other hand, the respondent's counsel contended that there was no proceeding pending before this court and therefore that matter should really be dealt with by the Federal Court before which an application for leave to appeal is pending.

Held, allowing the application:

(1) (Per **Abu Mansor JCA**) According to s 79 of the Courts of Judicature Act 1964 ('the CJA'), the appellants had correctly made the application before this court. This application was also proper and reasonable because it is trite law that a court who has given judgment certainly has the power to order stay (see p 671G–H).

(2) (Per **Abu Mansor** and **Ahmad Fairuz JJCA**) If the order was not stayed, the appellants' application for leave to appeal to the Federal Court would be rendered nugatory as even if they succeeded in their leave application and eventually in their appeal, their premises, the subject matter of the appeal, would already be irretrievable. Hence, the stay of execution of the order was therefore necessary in order to give any meaningful purpose to their application for leave to appeal (see p 672E–G).

(3) (Per **Ahmad Fairuz JCA**) The words 'interim preservation of property' and 'or in any other manner whatsoever' used in item 6 of the CJA enable the High Court to consider and grant or refuse

such an application as was now before this court. Rule 76 of the Rules of the Court of Appeal 1994 clearly empowers the Court of Appeal to exercise the powers under the aforesaid item 6 of the Schedule. These provisions were sufficient to give the Court of Appeal the jurisdiction to consider the application now before it (see p 673B–D).

(4) (Per **NH Chan JCA**, dissenting) There is no right to appeal from the decision of the Court of Appeal. There is only a right to apply to the Federal Court for leave to appeal to that court. Since there is no appeal as of right from the Court of Appeal to the Federal Court, the decision of the Court of Appeal is final and conclusive and an appeal cannot be entertained unless and until the Federal Court chooses to permit an appeal from the Court of Appeal to that court. As long as the decision of the Court of Appeal remains final and conclusive, there is no justification (the general principle is that a successful party is entitled to the fruits of his judgment) for the Court of Appeal to grant a stay of its order. When there is no appeal at all to the Federal Court (for without leave of that court there can be no appeal), it is absurd to say that 'without a stay, the appeal to the Federal Court might be nugatory' (see p 668A–C); *McLaughlin v Daily Telegraph Newspaper Co Ltd (No 1)* (1904) 1 CLR 243 and *McBride v Sandland (No 2)* (1918) 25 CLR 369 followed; *Marconi's Wireless Telegraph Co Ltd v Commonwealth (No 3)* (1913) 16 CLR 384 not followed.

Moreover, s 102 of the CJA and r 52 of the Rules of the Federal Court 1995 empower the Federal Court or the Court of Appeal to order a stay only when there is an appeal. Since there was no appeal (because an application for leave to appeal was not an appeal), the judgment of this court was final and conclusive. That being so, there was no justification for this court to suspend the right of the successful party to the fruits of his judgment. That that was so was as far as the jurisdiction of this court was concerned. The aggrieved party could still apply to the Federal Court for a stay under s 97(2) of the CJA (see p 670D–F).

[Bahasa Malaysia summary

Perayu-perayu telah gagal dalam rayuan mereka di Mahkamah Rayuan (lihat [1998] 2 MLJ 644) dan diperintahkan memberi milikan kosong premis mereka kepada penentang ('perintah tersebut'). Sementara itu, mereka telah memohon penggantungan perintah tersebut — iaitu untuk pengekalan hartanah — oleh mahkamah ini sementara menunggu pembicaraan permohonan mereka untuk kebenaran merayu di hadapan Mahkamah Persekutuan. Kebenaran daripada Mahkamah Persekutuan untuk merayu terhadap keputusan Mahkamah Rayuan masih belum diberikan oleh Mahkamah Persekutuan. Isu adalah sama ada Mahkamah Rayuan mempunyai

A bidang kuasa untuk membuat perintah sedemikian. Peguam pihak perayu menghujahkan bahawa sekiranya perintah tersebut tidak digantung, maka penentang akan meruntuhkan premis perayu-perayu dan seterusnya ini akan menyebabkan permohonan mereka untuk kebenaran merayu menjadi tidak berguna. Sebaliknya, peguam penentang berhujah bahawa tiada prosiding di hadapan mahkamah ini dan dengan itu hal tersebut sepatutnya diuruskan oleh Mahkamah Persekutuan yang mana permohonan untuk kebenaran merayu menunggu penyelesaian.

Diputuskan, membenarkan rayuan:

C (1) (Oleh **Abu Mansor HMR**) Menurut s 79 Akta Mahkamah Kehakiman 1964 ('AMK'), perayu-perayu telah membuat permohonan dengan betul di hadapan mahkamah ini. Permohonan ini adalah juga wajar dan munasabah kerana ia merupakan undang-undang mantap bahawa mahkamah yang D telah memberikan penghakiman memang berkuasa untuk memerintahkan penggantungan (lihat ms 671G–H).

(2) (Oleh **Abu Mansor** dan **Ahmad Fairuz HHMR**) Sekiranya perintah tidak digantung, permohonan perayu-perayu untuk kebenaran merayu kepada Mahkamah Persekutuan akan dijadikan tidak berguna kerana biarpun mereka berjaya dalam permohonan E untuk kebenaran dan akhirnya dalam rayuan mereka, premis mereka, yang menjadi perkara yang diperihalkan dalam rayuan, sudah pun menjadi tidak dapat dipulihkan. Justeru itu, penggantungan pelaksanaan perintah adalah perlu bagi memberikan tujuan yang bermakna kepada permohonan mereka F untuk kebenaran merayu (lihat ms 672E–G).

(3) (Oleh **Ahmad Fairuz HMR**) Perkataan 'interim preservation of property' dan 'or in any other manner whatsoever' yang digunakan dalam butiran 6 AMK membolehkan Mahkamah Tinggi untuk mempertimbangkan dan membenar atau menolak permohonan G sedemikian yang kini di hadapan mahkamah ini. Kaedah 76 Kaedah-Kaedah Mahkamah Rayuan 1994 jelas memberi kuasa kepada Mahkamah Rayuan untuk melaksanakan kuasa-kuasa di bawah butiran 6 Jadual tersebut. Peruntukan-peruntukan ini memadai untuk memberikan Mahkamah Rayuan bidang kuasa untuk mempertimbangkan permohonan yang kini di depannya H (lihat ms 673B–D).

(4) (Oleh **NH Chan HMR**, menentang) Tiada hak wujud untuk merayu daripada keputusan Mahkamah Rayuan. Apa yang terdapat cumalah hak untuk memohon kepada Mahkamah Persekutuan untuk kebenaran merayu kepada mahkamah itu. I Oleh kerana tidak terdapat rayuan mengikut hak daripada Mahkamah Rayuan kepada Mahkamah Persekutuan, keputusan Mahkamah Rayuan adalah terakhir dan muktamad dan suatu rayuan tidak boleh dilayan melainkan dan sehingga Mahkamah

Persekutuan memilih untuk membenarkan suatu rayuan daripada Mahkamah Rayuan kepada mahkamah itu. Selagi keputusan Mahkamah Rayuan kekal terakhir dan muktamad, tiada justifikasi (prinsip am adalah bahawa suatu pihak yang berjaya berhak kepada hasil penghakimannya) untuk Mahkamah Rayuan membenarkan penggantungan perintahnya. Apabila tiada rayuan sama sekali kepada Mahkamah Persekutuan (kerana tanpa kebenaran daripada mahkamah itu rayuan tidak boleh dibuat), tidak masuk akal untuk mengatakan bahawa 'tanpa satu penggantungan, rayuan kepada Mahkamah Persekutuan mungkin menjadi tidak berguna' (lihat ms 668A–C); *McLaughlin v Daily Telegraph Newspaper Co Ltd (No 1)* (1904) 1 CLR 243 dan *McBride v Sandland (No 2)* (1918) 25 CLR 369 diikut; *Marconi's Wireless Telegraph Co Ltd v Commonwealth (No 3)* (1913) 16 CLR 384 tidak diikut.

Tambahan pula, s 102 AMK dan k 52 Kaedah-Kaedah Mahkamah Persekutuan 1995 memberi kuasa kepada Mahkamah Persekutuan atau Mahkamah Rayuan untuk memerintahkan penggantungan hanya apabila suatu rayuan dibuat. Oleh kerana tiada rayuan (kerana satu permohonan untuk kebenaran merayu bukanlah suatu rayuan), penghakiman mahkamah ini adalah terakhir dan muktamad. Oleh itu, tiada justifikasi untuk mahkamah ini menggantung hak pihak yang berjaya kepada hasil penghakiman yang diberikannya. Bahawa ini adalah demikian adalah sejauh mana bidang kuasa mahkamah ini adalah berkenaan. Pihak yang terkilan masih boleh memohon kepada Mahkamah Persekutuan untuk penggantungan di bawah s 97(2) AMK (lihat ms 670D–F).]

Notes

For cases on application for stay of execution of judgment, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3120–3121.

Cases referred to

Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (1986) 69 ALR 265 (refd)

Marconi's Wireless Telegraph Co Ltd v Commonwealth (No 3) (1913) 16 CLR 384 (not folld)

McBride v Sandland (No 2) (1918) 25 CLR 369 (folld)

McLaughlin v Daily Telegraph Newspaper Co Ltd (No 1) (1904) 1 CLR 243 (folld)

Quinlan v Quinlan; ex p Quilan [1900] AC 496 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 43, 44, 79, 80, 96, 97(2), 102, Schedule item 6

Rules of the Court of Appeal 1994 rr 4, 76
Rules of the Federal Court 1995 rr 52, 53
Rules of the High Court 1994 O 92 r 4

R Sivarasa (*Anni Santhiago* and *Yasmeen Shariff* with him) (*Mahani Hamid & Yasmeen*) for the applicants.
VS Viswanathan (*TH Su & Co*) for the repondent.

Cur Adv Vult

NH Chan JCA: This is an application by notice of motion to the Court of Appeal for a stay of execution on a judgment of the Court of Appeal (see [1998] 2 MLJ 644) pending an application to the Federal Court for leave to appeal. An appeal can only lie from the Court of Appeal to the Federal Court with the leave of the Federal Court; see s 96 of the Courts of Judicature Act 1964 which reads:

> Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court granted in accordance with section 97 —
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> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction; ... .

The section recognizes that only the Federal Court has a right to grant leave to appeal to that court. And a person who is dissatisfied with the decision of the Court of Appeal has a right to apply for that leave from the Federal Court. It is not a right to appeal. It is only a right to apply to the Federal Court for leave.

There is no appeal as of right from the Court of Appeal to the Federal Court so that unless and until leave to appeal has been granted by the Federal Court, there is no appeal at all in the Federal Court. The decision of the Court of Appeal is final unless the Federal Court chooses to grant such leave.

And s 97 reads:

> (1) An application under section 96 for leave to appeal to the Federal Court shall be made to the Federal Court within one month from the date on which the decision appealed against was given, or within such further time as may be allowed by the Court.
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> (2) Where the judgment appealed against requires the appellant to pay money or perform a duty, the Federal Court shall have power, when granting leave to appeal, either to direct that the judgment shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the Court shall seem just; and in case the Court shall direct the judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security to the satisfaction of that Court for the due performance of any order as the Federal Court may make in order to give effect thereto.

In the instant case, leave has yet to be granted by the Federal Court to appeal to that court from the judgment of the Court of Appeal. As there is no appeal which is pending from the Court of Appeal to the Federal Court, there is no justification for the Court of Appeal to stay execution on its judgment from which there is no right to appeal. '... [I]t is absolutely unheard of to stay proceedings upon the judgment of a court from which there is no appeal as of right': said Griffith CJ in the Australian High Court case of *McLaughlin v Daily Telegraph Newspaper Co Ltd (No 1)* (1904) 1 CLR 243 at 283. In *McLaughlin*, counsel for the respondents applied to the High Court for a stay of proceedings pending an application to the Privy Council for special leave to appeal to the Board. Griffith CJ, in delivering the judgment of the High Court (Griffith CJ, Barton and O'Connor JJ), said (at p 283):

> There is no doubt that the court has power to stay execution of its judgments, but in this case the Constitution has provided that the court's decision shall be final and conclusive. It is true that the Judicial Committee may give leave to appeal from our judgment. Under the system of appeals from State courts to the Privy Council, the appeal lay as of right, but it is absolutely unheard of to stay proceedings upon the judgment of a court from which there is no appeal as of right. To stay execution because the court doubted whether it had given a proper judgment would be unworthy of a Court of Appeal. The application must be refused.

Likewise, as in the instant case, the judgment of the Court of Appeal is final and conclusive unless the Federal Court chooses to permit an appeal to that court.

McLaughlin v Daily Telegraph Newspaper Co Ltd (No 1) was cited with approval by Barton J in another Australian High Court case *McBride v Sandland (No 2)* (1918) 25 CLR 369 at p 372. He said:

> If this were an application to the High Court itself to stay proceedings upon the judgment of the High Court in the previous action between the same parties, what was said by the learned Chief Justice in *McLaughlin v Daily Telegraph Newspaper Co* (1904) 1 CLR 243 at 283, would be precisely applicable.

However, Barton J after stating that the judgment of Griffith CJ in *McLaughlin* (which we have reproduced above) would be precisely applicable, went on further to say (at pp 372, 373):

> The High Court itself would not grant a stay of execution of one of its own judgments pending an application to the Privy Council for special leave to appeal from that judgment, unless there were some special or peculiar grounds, as indeed there were in the case of *Marconi's Wireless Telegraph Co v Commonwealth (No 3)* (1913) 16 CLR 384. But it must be borne in mind, in respect of all applications for a stay pending an appeal from the High Court to the Privy Council, that there is no appeal of right, and therefore the citing of cases in which there was a right of appeal is beside the question in this case.

The question is, was Barton J right in his opinion that where there were some special or peculiar grounds, a stay of execution could be granted

pending an application to the Privy Counsel for leave to appeal from the judgment of the High Court of Australia even though there is no appeal of right. Barton J relied on his own decision in *Marconi's Wireless Telegraph Co Ltd v Commonwealth (No 3)* (1913) 16 CLR 384, which is also a decision of the High Court. The headnote (at pp 334, 385) reads:

> In an action against the Commonwealth for infringement of patent the High Court had, on the application of the plaintiffs, made an order for inspection against the Commonwealth. A motion for a stay of proceedings under the order, pending an application to the Privy Council for special leave to appeal, was made by the Commonwealth, and the circumstances were such that unless a stay was granted the appeal would be rendered nugatory, and that if it was simply granted the whole benefit of the action might be lost to the plaintiffs.
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> Held, that proceedings should be stayed until the hearing of the application to the Privy Council, on the Commonwealth undertaking to expedite the application and to pay such damages, whether legally claimable or not, as the High Court or a Justice thereof might think just and fair as compensation to the plaintiffs for any damage they might sustain by reason of the stay.

Barton ACJ, in delivering the judgment of the Court (Barton ACJ, Isaacs and Rich JJ) said (at p 386):

> The court will not ordinarily grant an application of this kind unless very strong and special grounds are shown. This is a very peculiar case. The conditions are such that, on the one hand, if the stay is granted without more, the whole benefit of the action may be lost to the plaintiffs, while, on the other hand, unless the stay is granted on some fair terms, the defendants' appeal will be nugatory. It really is a question of the preservation of the rights of the parties without disregard of the balance of convenience. Under those circumstances, we think that the order we propose to make is a fair one.

Barton J thought that if very strong and special grounds are shown, a stay of the order of the High Court could be granted pending the obtaining of leave from the Privy Council. And the ground relied on in *Marconi* was that, 'unless the stay is granted on some fair terms, the defendants' appeal will be nugatory'. But, the fallacy of this reasoning is that the judge had completely overlooked the fact that (until an appeal has been permitted by the Privy Council) the judgment or order of the High Court was final and conclusive since there was no right to appeal. How can there be an appeal which will be nugatory when there is, in fact, no appeal at all. In reality, as it appears later, Barton J seems to have recanted from this view; see *McBride v Sandland* where he said (at pp 373, 374):

> The grounds upon which Buchanan J acted are practically, as far as we know (and no others are suggested), that without a stay the appeal to the Privy Council might be nugatory, that the appellant could not be prejudiced, and that it was not suggested that the application to the Privy Council was not bona fide or was for delay. It may be granted that the application was bona fide and was not undertaken for delay. But in any case there was no appeal as of right. An appeal could not be entertained unless and until special leave to appeal was granted.

There is no right to appeal from the decision of the Court of Appeal. There is only a right to apply to the Federal Court for leave to appeal to that court. Since there is no appeal as of right from the Court of Appeal to the Federal Court, the decision of the Court of Appeal is final and conclusive and an appeal could not be entertained unless and until the Federal Court chooses to permit an appeal from the Court of Appeal to that court. As long as the decision of the Court of Appeal remains final and conclusive, there is no justification (the general principle is that a successful party is entitled to the fruits of his judgment) for the Court of Appeal to grant a stay of its order. When there is no appeal at all to the Federal Court (for without leave of that court there can be no appeal), it is absurd to say that 'without a stay the appeal to the [Federal Court] might be nugatory'.

Section 102 of the Courts of Judicature Act 1964 and r 52 of the Rules of the Federal Court 1995 will apply only when an appeal has been instituted. An application for leave to appeal is not, in my judgment, an appeal. See per Brennan J in *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd* (1986) 69 ALR 265 at p 266. He said (in the High Court of Australia sitting as a single judge):

> The applicant invoked s 77u of the Judiciary Act 1903 (Cth) as a source of the jurisdiction to stay but that section applies only when an appeal has been instituted. An application for special leave to appeal is not, in my opinion, an appeal within the definition of that term in s 2 of the Judiciary Act.

Section 102 and r 52 provide for the Federal Court or the Court of Appeal to order a stay only when there is an appeal or when an appeal could be instituted (as when leave has been granted).

In the event when there is an appeal or when an appeal could be instituted, s 79 of the Courts of Judicature Act 1964 and r 53 of the Rules of the Federal Court 1995 provide that the application be made in the first instance to the Court of Appeal.

Section 97(2) of the Courts of Judicature Act empowers the Federal Court 'when granting leave to appeal, either to direct that the judgment shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the Court shall seem just; and in case the Court shall direct the judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security to the satisfaction of that Court for the due performance of any order as the Federal Court may make in order to give effect thereto'.

There are no statutory provisions similar to our s 97(2) applicable to the High Court of Australia. In the days when the Privy Council was the final court of appeal, it had no jurisdiction to order a stay of execution. See *Quinlan v Quinlan; ex p Quilan* [1900] AC 496. Lord Davey, in delivering the judgment of the Board (Lord Davey, Lord Robertson, Lord Lindley, Sir Henry De Villiers, and Sir Ford North) said (at p 498):

> With regard to that part of the prayer of the petition which asks their Lordships to stay the sale advertised for May 26 pending the appeal, their Lordships have no jurisdiction to make an order for that purpose, ...

A So that the position of the High Court of Australia is similar to that of the Privy Council when it was the final court of appeal. The difference is that while the Privy Council accepted the fact that it had no jurisdiction to grant a stay of execution pending an appeal to the Council (presumably, on the principle that an appeal shall not operate as a stay without statutory B intervention), the High Court of Australia chose to take the path of judicial legislation by creating a jurisdiction to grant a stay where none had existed before; see *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd.* This is how it was put by Brennan J (at p 267):

> A stay to preserve the subject matter of litigation pending an application for special leave to appeal is an extraordinary jurisdiction and exceptional C circumstances must be shown before its exercise is warranted. If an order for a stay is made, the respondent is kept out of the benefit of the order of the court in which the matter is pending until the hearing of the application for special leave to appeal. That was the situation to which this court adverted in *Marconi's Wireless Telegraph Co Ltd v Commonwealth (No 3)* (1913) 16 CLR 384. There the court granted an order staying the operation D of one of its own orders pending the hearing of an application to the Privy Council for special leave to appeal. What the court said in that case (at p 386) is applicable to this case:
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> > 'The court will not ordinarily grant an application of this kind unless very strong and special grounds are shown. This is a very peculiar case. The conditions are such that, on the one hand, if the stay is granted E without more, the whole benefit of the action may be lost to the plaintiffs, while, on the other hand, unless the stay is granted on some fair terms, the defendants' appeal will be nugatory. It really is a question of the preservation of the rights of the parties without disregard of the balance of convenience.'

F Fortunately for us in this country, our legislators had the hindsight to enact s 97(2) of the Courts of Judicature Act 1964 which empowers the Federal Court to grant a stay pending an appeal to that court when granting leave.

When there is no right to appeal (as when leave has not been obtained), G the judgment of the Court of Appeal is final and conclusive. The ordinary principle is that a successful party is entitled to the fruits of his judgment. That being so, there is no justification (as it is neither an injustice nor an abuse of the process of the court to follow the principle) for the Court of Appeal to suspend the right of the successful party to the fruits of his judgment.

H When there is a right to appeal (as when leave has been granted), there is still the principle that an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from. However, statutory provisions (such as ss 97(2) and 102 of the Courts of Judicature Act 1964) may empower a court or courts to order a stay or suspension of the I decision appealed from pending the appeal.

Finally, I must advert to *Neduncheliyan Balasubramaniam v Kohila a/p Shanmugam* [1997] 3 MLJ 768 which is a decision of the Court of Appeal and binding on this court. This is what Shankar JCA, in delivering the judgment of the court (Mahadev Shankar and Denis Ong JJCA, Mokhtar

Sidin JCA absent with the consent of the parties under s 42 of the Courts of Judicature Act 1964), said (at pp 793, 794): A

> The grounds for the stay were that the appeal to the Federal Court would be nugatory if the children were taken out of the jurisdiction by 24 August 1997. Mr Bachan submitted that his intention was to ensure that the children should remain in Malaysia until the appeal has been disposed of by B the Federal Court. He submitted that if the children were not here until then, the appeal would be academic.

And he concluded (at p 794):

> Any appeal to the Federal Court would require leave, which may or may not be granted after that court had considered the judgment of this court. C
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> Kohila was entirely at liberty to apply to the Canadian courts at any time to grant her custody of the children.
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> In the circumstances, if any application for stay was to be made at all, we felt that such an application had to be made, not here, but in the Federal Court.

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In my judgment an application for leave to appeal is not an appeal. Section 102 of the Courts of Judicature Act 1964 and r 52 of the Rules of the Federal Court 1995 empower the Federal Court or the Court of Appeal to order a stay only when there is an appeal. Since there is no appeal (because an application for leave to appeal is not an appeal), the judgment of this court is final and conclusive. That being so, I am of the E view that there is no justification for this court to suspend the right of the successful party to the fruits of his judgment. That that is so is as far as the jurisdiction of this court is concerned. The aggrieved party can still apply to the Federal Court for a stay under s 97(2) of the Courts of Judicature Act 1964. F

Abu Mansor JCA: The applicants/appellants lost their appeal in the Court of Appeal on 20 January 1998 and, on confirmation of the Shah Alam High Court order, they were ordered to give vacant possession of their premises to the respondent (see [1998] 2 MLJ 644). They have now to have leave of the Federal Court to appeal against that Court of Appeal G decision. They now move this court for a stay of the Court of Appeal order of vacant possession until such time that they can have their leave application heard by the Federal Court. The application of the applicants/appellants before us therefore is for the preservation of the property by this court pending the hearing of their leave to appeal application before the Federal H Court.

The issue is whether this court has jurisdiction to make an order. Counsel for the appellant contends that we have, by virtue of r 76 of the Rules of the Court of Appeal 1994 and also by virtue of item 6 of the Schedule to the Courts of Judicature Act 1964, reading them with r 4 of I the Court of Appeal Rules 1994, again reading these together with O 92 r 4 to the Rules of the High Court 1980.

We will now examine these separate provisions. Rule 76 of the Rules of the Court of Appeal 1994 provides:

A Ancillary powers of the Court

The Court shall exercise, for all purposes incidental to or arising from any application or appeal, all the powers which, under the provisions of any written law in force in the place of trial at first instance, were vested in the trial Judge, whether before, during or after the trial, to the extent that such powers may be applicable to the circumstances of an application or appeal B to the Court.

Then item 6 of the Schedule to the Courts of Judicature Act 1964 reads:

Preservation of property

Power to provide for the interim preservation of property the subject-matter C of any cause or matter by sale or by injunction or the appointment of a receiver or the registration of a caveat or a lis pendens or in any other manner whatsoever.

Reading them with r 4 of the Rules of the Court of Appeal 1994, we have:

Application of Rules of the High Court 1980

D Where no other provision is made by any written law or by these Rules, the procedure and practice in the Rules of the High Court 1980 shall mutatis mutandis apply.

Then lastly, we have O 92 r 4 of the Rules of the High Court 1980 which provides:

E

For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

On the other hand the respondent's counsel contend that there is nothing F pending before us and therefore that matter should really be dealt with by the Federal Court before which an application for leave to appeal is pending. We have no quarrel with that contention but the provisions referred to by the appellants' counsel clearly empower this court to grant the appellants' application and s 79 of the Courts of Judicature Act G 1964 reads:

Applications

Whenever application may be made either to the Court of Appeal or to the Federal Court, it shall be made in the first instance to the Court of Appeal.

The appellants have therefore correctly made this application before this H court. This application, in our view, is also proper and reasonable because it is trite law that a court who has given judgment certainly has the power to order stay. We say we have jurisdiction and we hereby allow the motion with no cost.

Since the motion was for the purpose of ascertaining whether this I court has jurisdiction to entertain this application, this court had decided by a majority of two to one that it has and hence we allowed the appellants/ applicants to proceed to address us on the merit of their application for a stay.

After hearing the applicants' counsel, we were persuaded to grant him a stay of the Court of Appeal order and that of the High Court until the disposal of the leave application to appeal against the Court of Appeal decision of 20 January 1998.

Mr Sivarasa for the applicants convinced us that no doubt that applicants' claim is for compensation, nonetheless if we were not to stay the respondent's vacant possession order before the hearing of the applicants' leave to appeal, it is clear the applicants' right to be there would be dissipated and gone before the appellants can have their several claims assessed and determined and their equity would largely have been eroded and destroyed. We were unanimous that to that extent the applicants' appeal would be nugatory. How can it not be so when what is left would be empty fields? We, therefore, allow the applicants' application for a stay of the Court of Appeal order for vacant possession of 20 January 1998 until the disposal of the applicants' application for leave to appeal in the Federal Court with cost of this application in the appeal.

Ahmad Fairuz JCA: The notice of motion before this court shows that the application is for a stay of execution of the order of the High Court Shah Alam (which is at p 48 of the motion record. That order had been confirmed by the Court of Appeal (see p 18 of the record) — see [1998] 2 MLJ 644).

Paragraph 9 of the affidavit in support of the motion particularly stresses that if the High Court order is not stayed, then the respondent will demolish the applicants' premises. This will consequently render their application for leave to appeal to the Federal Court nugatory as even if they succeed in their leave application and eventually in their appeal, their premises, the subject matter of the appeal, will already be irretrievable. Hence, the stay of execution of the High Court order is therefore necessary in order to give any meaningful purpose to their application for leave to appeal. It is to be noted that when the applicants appealed to the Court of Appeal, the High Court granted a stay order to the applicants. I realize that in the circumstances of the applicants' appealing to the Court of Appeal, s 44 of the Courts of Judicature Act 1964 ('the CJA') empowers the Court of Appeal to grant the stay whilst the High Court too has the power to grant the stay; and by virtue of s 43 of the CJA, the application has to be made in the first instance to the High Court. This the applicants did and in fact obtained the stay order. But what this court is now faced with is the question of whether it can grant a stay when there is no proceeding pending before it. If there is, then s 44 of the CJA would apply. The Federal Court however, in my opinion, has the power to consider and grant or refuse this application under s 80 of the CJA as the application for leave to appeal is a proceeding then pending before the Federal Court. Faced with these provisions of law, learned counsel for the applicants drew this court's attention to item 6 of the Schedule to the CJA which reads:

> Preservation of property
>
> Power to provide for the *interim preservation of property* the subject-matter of any cause or matter by sale or by injunction or the appointment of a receiver

A or the registration of a caveat or a lis pendens *or in any other manner whatsoever*. (Emphasis added.)

In this connection, I would like to emphasize the words 'interim preservation of property' and 'or in any other manner whatsoever' used in that paragraph. Clearly therefore, this item 6 enables the High Court to consider and grant B or refuse such an application as is now before this court. Learned counsel then proceeded to cite r 76 of the Rules of the Court of Appeal 1994 which reads:

> The Court shall exercise, for all purposes incidental to or arising from any application or appeal, all the powers which, under the provisions of any C written law in force in the place of trial at first instance, were vested in the trial Judge, whether before, during or after the trial, to the extent that such powers may be applicable to the circumstances of an application or appeal to the Court.

This rule, to my mind, clearly empowers the Court of Appeal to exercise the powers under the aforesaid item 6 of the Schedule. These provisions D are sufficient, in my opinion, to give this Court of Appeal the jurisdiction to consider the application now before this court.

Before moving to the merits of the application, I would like to refer to what Brennan J said in *Jennings Construction Ltd v Burgundy Royale* (1986) ALR 265 at p 267, that is:

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> When an application for special leave to appeal is made to this court, a jurisdiction to stay may be exercised by the court below and it is to that court — the court in which the matter is pending and which is familiar with the matter — that an application to stay should first be made. In this case, the Court of Appeal, not wishing to pre-empt the view that may be expressed F in this court, tailored its order accordingly. In future, there should be no inhibition on the court in which the matter is pending framing a stay order, if a stay be appropriate, to avoid the necessity for application to this court.

In this connection our s 79 of the CJA clearly requires the application to be made in the first instance to the Court of Appeal. Hence, the applicants made this application in this court.

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As to the merits of the application, I am of the view that the applicants' premises should be preserved. The destruction of their premises will, as contended in para 9 of their affidavit in support, cause them to suffer losses, hardships and difficulties which are irremediable ('mengalami kerugian, penderitaan dan kesusahan yang tidak boleh dibaiki'). I find no H evidence that can show that such contention of the applicants as inherently improbable. Furthermore, the applicants in their counterclaim (see p 121 of the record) have, amongst other things, sought for a declaration that they have a right to remain on the land in question until their equities are being satisfied in the form of compensation and damages. If a stay is not granted, then, the very grant of vacant possession to the respondent will I mean the destruction of that right. From then on, any success in the application for leave to appeal or eventually in the appeal itself will be meaningless as that right can never be restored. Thus, a stay is necessary to ensure that that right would be available to the applicants in the event

that the Federal Court decides their application for leave to appeal in their favour. Hence, any refusal to grant the stay would render the application for leave to appeal, or the appeal itself, if the Federal Court allows the application for leave to appeal, nugatory. For these reasons, I allow the application of the applicants to the extent that the execution of the order of the High Court Shah Alam shall be stayed forthwith until the disposal of the applicants' application for leave to appeal. Costs is granted as prayed in the application.

Application allowed.

Reported by Loo Lai Mee